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November 5, 1982

Mr. William Dircks
 Executive Director for Operations
 U.S. Nuclear Regulatory Commission
 Washington, D.C. 20555

SUBJECT: FOIA-82-342 - Appeal from an Initial FOIA Decision

Dear Mr. Dircks:

On July 26, 1982, we requested, on behalf of the Natural Resources Defense Council, Inc., pursuant to the Freedom of Information Act, that the NRC make available all reports, memoranda or other work performed by Science Applications, Inc. (SAI) for the Clinch River Breeder Reactor (CRBR) Project. In the Commission's "final response" to that request (attached) dated October 8, 1982, six documents were withheld from public disclosure pursuant to Exemption 5 of the Freedom of Information Act. (5 U.S.C. §552(b)(5) and 10 CFR §9.5(a)(5) of the Commission's regulations.) The NRC seeks to withhold these documents under the "deliberative process" aspect of Exemption 5.

We hereby demand immediate detailed explanations how Exemption 5 applies individually to each of these withheld documents, as required by well-established FOIA law. We also demand an immediate determination whether there are factual portions of these documents which are segregable from exempt deliberative portions, and immediate release of any such factual portions, as required by law. For remaining portions of these documents which are determined to be deliberative, we demand immediate release of any recommendations or opinions which have subsequently been formally or informally adopted by the NRC Staff or which have been used by the Staff in its dealings with the public, as required by law. Finally, we appeal the initial decision in toto.

While the cases cited by the NRC in its October 8 response clearly establish the proposition that Exemption 5 may be used to withhold documents written at the behest of government agencies by outside consultants, they do not stand for the proposition that everything written by such consultants

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is exempt. The agency must still meet its burden of showing explicitly that the documents in question are pre-decisional; that they are an actual component of the deliberative, policy-making process; that they do not contain segregable factual materials which are non-exempt; and that any recommendations or opinions expressed have not been adopted either formally or informally by the agency or used by it in its dealings with the public.

NRC's response to this FOIA request wholly fails to comply with the obligation to explain the justification for withholding the documents in question. As the U.S. Court of Appeals for the District of Columbia Circuit has held:

when an agency seeks to withhold information it must provide a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of the withheld document to which they apply.

Mead Data Central, Inc. v. U.S. Dept. of the Air Force, 566 F.2d 242, 251 (D.C. Cir. 1977) (citations omitted). NRC's response does not begin to meet this standard.

After a lengthy discussion of the consulting relationship between SAI and the NRC Staff, the response has two sentences which constitute the NRC's specific rationale for withholding these documents:

These memoranda [of two telephone conversations] represent a sharing of ideas between scientists and by no means are final technical positions. Also, the other documents . . . constitute input to the staff (in some cases draft input) to be used as part of the decision making process in taking final position (sic) on various technical questions and issues.

These are the only statements in the entire response which serve to explain the nature of the withheld documents. The Appendix which lists the five withheld documents (Attachment A) is equally unhelpful, identifying two documents as "suggested answers to interrogatories", one as "review" of interrogatory answers, and two others only as "ITCs" with dates and names of participants (and no indication whatsoever of the subject matter). 1/

1/ While the body of the response speaks of "two telephone conversations between members of NRR Staff and Dr. Rumble", the Appendix appears to identify three telephone conversations (assuming that is the meaning of "ITC"), only one of which identifies Dr. Rumble as a participant.

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The NRC seeks here to withhold these documents under the "deliberative process privilege" of Exemption 5. In deciding whether that privilege applies, courts "look to whether the document is 'pre-decisional'--whether it was generated before the adoption of an agency policy--and whether the document is 'deliberative'--whether it reflects the give-and-take of the consultative process." Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980). Looking at the sparse document descriptions in the Appendix to NRC's response, it is not at all clear that all these documents precede in time the Staff's relevant decisions concerning positions to take in the CRBR proceeding. In item #1, there are apparently two different documents, both of which are entitled "reviews". The title alone suggests that these communications followed rather than preceded the materials they discuss. "Task 1-A" is identified only as "Review of Section 7.1 of the FES". It is obviously not part of the deliberative process which went into the preparation of the FES, which preceded this communication by over five years. "Task 1-B" is identified as "Preliminary Review of NRC Staff Answers to NRDC 14th Set of Interrogatories (December 6, 1976)." A 1982 "review" clearly was not pre-decisional to 1976 interrogatory answers.

Even if the NRC means to suggest that these documents were part of the deliberative process in preparing the Draft Supplement to the FES and updated interrogatory answers, 2/ these documents still do not necessarily qualify under Exemption 5:

[E]ven if the document is predecisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency decision on an issue or is used by the agency in its dealings with the public.

Coastal States, supra, 617 F.2d at 866. In the instant case, it is clear that any deliberative process involved in the supplementation of the FES or old interrogatories is now past.

2/ This illustrates precisely the difficulty which results from NRC's woefully inadequate explanation for the application of Exemption 5 here. If NRC's response explained what the withheld documents were predecisional, to and what they deliberated

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The period for supplementation of discovery responses has now ended, and the Final Supplement to the FES has been issued. Considering the nature of these documents, it seems quite likely that they were "used by the agency in its dealings with the public". Indeed, the only purpose of the interrogatory answers in issue was to deal with a public organization: NRDC. It is quite possible that the SAI recommendations, if that is what these communications were, have in fact been adopted, either formally or informally, by the Staff as its positions in the CRBR proceeding. At the very least, informal adoption has undoubtedly occurred to some extent unless the Staff has altogether disregarded the recommendations of its consultants-- a proposition which seems unlikely.

To come within Exemption 5 a document must be a direct part of the pre-decisional process in that it makes recommendations or expresses opinions on legal or policy matters to be decided by the agency. Vaughn v. Rosen, 523 F.2d 1136, 114 (D.C. Cir. 1975). The government must carry its burden of establishing a genuine pre-decisional process. Id. Considering the nature of SAI as a scientific consulting firm, it seems unlikely that the instant documents would contain recommendations or opinions on legal or policy matters. Indeed, it would be peculiar and inappropriate for NRC Staff to seek or accept policy advice from a scientific consultant such as SAI-- particularly in light of SAI's longstanding and extensive relationship with Applicants on CRBR and other projects.^{3/}

In addition, FOIA exemptions should be narrowly construed, "in such a way as to provide the maximum access consonant with the overall purpose of the Act." Vaughn v. Rosen, 484 F.2d 820, 823 & n. 11 (D.C. Cir. 1973). Congress was aware that an overbroad interpretation of Exemption five could nearly nullify the disclosure mandate of the FOIA and indicated that it should be applied "as narrowly as consistent with efficient Government operations." S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1956); see H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966). Mead Data Central, supra, 566 F.2d at 252, n. 16.

^{3/} A FOIA request to DOE has revealed that SAI has had 100 contracts with DOE since January 1, 1979, with an approximate value of over \$37 million.

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Pursuant to this general principle of narrow construction, the Supreme Court has recognized a distinction between "materials reflecting deliberative or policy-making processes on the one hand, and purely factual, investigative matters on the other." EPA v. Mink, 410 U.S. 73, 89 (1973). Thus, even if a document is pre-decisional, "the privilege applies only to the 'opinion' or 'recommendatory' portion of [a document], not to factual information which is contained in the document." Coastal States, supra, 617 F.2d at 867. The facts in a pre-decisional document must be disclosed unless they are "inextricably intertwined" with exempt portions. Ryan v. Department of Justice, 617 F.2d 781, 790-91 (D.C. Cir. 1980); Mead Data Central, supra, 566 F.2d at 260.

In the instant case, it is not at all clear that the documents in question are basically "opinion" or "recommendatory" in nature. Quite the contrary, given the fact that SAI is a scientific consulting firm, the likelihood is great that the matters discussed in these communications are primarily or entirely of a factual or analytical nature. Even the NRC represents these communications as "a sharing of ideas between scientists" which deal with "various technical questions and issues." Such material is not subject to the FOIA exemption.

NRC has altogether failed to meet its responsibility to explain the reasons for withholding these documents individually. It has not indicated whether there are segregable factual portions of the documents which could be disclosed, nor has it explained that factual and deliberative material are inextricably intertwined, and thus wholly exempt from disclosure. For items 2 and 3 in the listing in NRC's Appendix, there is no indication whatsoever of the subject matter of the communications--only dates and participants are indicated. Item 1, as noted above, indicates only a "review" of an FES section and a "review" of certain interrogatory answers. No indication is given whether these reviews were later formally or informally "adopted" or used by NRC Staff in dealing with NRDC, nor whether they are factual or deliberative in nature. Items 4 and 5 apparently include suggested interrogatory answers, but there is no indication which interrogatories were involved, whether and to what extent the suggested answers were adopted by the NRC Staff, or whether the material is primarily factual/analytical or recommendatory.

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We appeal the NRC's "final response" to FOIA-82-342 and request, in the alternative:

1. that all the documents in question be disclosed in their entirety; or
2. that the NRC immediately provide a detailed justification for withholding each of these documents individually, specifically identifying the reasons why Exemption 5 is relevant and correlating those claims with the particular parts of the withheld documents to which they apply. NRC should disclose each segregable factual portion of each of these documents immediately. For each portion of each document determined to be deliberative or recommendatory, NRC should immediately disclose any recommendations which have been either formally or informally adopted by the Staff or have been used by the Staff in its dealings with NRDC or any other public representative or entity. NRC should provide detailed explanations for continuing to withhold any portions of any of these documents which it alleges are recommendations which have not been formally or informally adopted or used by the Staff in its dealings with the public.

It should be stressed that the clear legal requirements stated in paragraph 2 above do not arise for the first time on appeal of an initial FOIA decision. Rather, they are requirements which NRC should have adhered to in making its initial response. For this reason, we do not interpret the law to allow the NRC to take 30 days to respond to this request as an appeal. The detailed explanations requested above were due from NRC in its initial response; it should not be necessary to appeal a decision in order to get the kind of justification for withholding documents which was owing in the first instance. Therefore, NRC is already delinquent and under an obligation to respond immediately to this request.

Our recent experience with FOIA requests to the NRC indicates a pattern of flagrant abuse of Exemption 5 of FOIA. It does not exempt every document which precedes an agency decision. It does not exempt segregable factual or investigative materials at all, nor does it exempt recommendations or opinions once they have been adopted either informally or formally as

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the agency position or once they have been actually used by the agency in its dealings with the public. These strict limitations on the applicability of the "deliberative process" exemption must be explicitly addressed in NRC initial decisions withholding disclosure of documents under it. The agency is not entitled to an extra 30 days to properly explain denials by compelling parties seeking information under FOIA to appeal regularly insufficient denials.

Very truly yours,


Ellyn R. Weiss

Enclosures

DT:law